

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 96M-116

MAY 15 11 56 AM '96

In re Applications of	)	WT DOCKET NO. 96-41	61363
LIBERTY CABLE CO., INC.)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

MEMORANDUM OPINION AND ORDER

Issued: May 14, 1996

Released: May 15, 1996

1. This is a ruling on "Time Warner Cable of New York City's Consolidated Motion To Compel Responses To Interrogatories And Production Of Documents By Bartholdi Cable Co., Inc." [formerly Liberty Cable Co., Inc.] ("Liberty") that was filed on April 29, 1996. Liberty filed its Opposition on May 6, 1996. The Wireless Telecommunications Bureau filed Comments on May 7, 1996, which Liberty Opposed on May 9, 1996.

Interrogatories

2. Time Warner requests the identity of persons involved in ten events concerning document preparation in regard to: answers to the Time Warner interrogatories; the Internal Audit Report ("IAR"); the wiring with coaxial cable of the "Europa"; a Statement of Eligibility of Use Form 402; a Reply to Opposition to Request for Special Temporary Authority; and "Exhibit" 1 to Consolidated Opposition to Petition for Waiver of the Commission's Rules and Opposition to Supplemental Filing to Emergency Petition for Stay (referred to as "Stay Opposition"). There is an associated instruction calling for the identification of documents relied upon for each interrogatory answer or which corroborates each answer. Liberty identified its President, Peter O. Price, as a participant in Liberty's answers to Time Warner's interrogatories and as a

¹ The Bureau's Comment and the Liberty Opposition to the Bureau's Comment address a significant but tangential issue concerning confidentiality and considerations of comity with a court stay order. The views of both parties have been helpful in this ruling. See 47 C.F.R. §1.294(d).

reviewer of the "Statement of Eligibility and Use" and the "Reply to Opposition to Request for Special Temporary Authority." Liberty objected to all other interrogatories and there were no other persons identified.

3. Without first receiving the IAR for review, production of which is being withheld by Liberty, the Presiding Judge cannot rule on Liberty's objections of confidentiality. However, the issue of confidentiality is now before the United States Court of Appeals for the District of Columbia Circuit (No. 96-1030). On April 24, 1996, the Court stayed disclosure of the IAR because there has been presented "a serious question regarding the applicability of the attorney-client and work product privileges" and because Liberty "stands to be irreparably harmed if it is required to disclose its report before the court determines whether the report is protected from disclosure."² However, the parties disclose that there is an ongoing negotiation of a Protective Order

² The Bureau states in its Comment that it agrees with Time Warner that the Court's Stay Order "does not preclude the presiding officer in this proceeding from compelling its release by Bartholdi [formerly Liberty] to Time Warner." But in the next sentence the Bureau notes, conversely, that "the Commission's Order mandating Bartholdi to release the audit to Time Warner [is stayed]." At this time, no reliance can be placed on the Commission's Order as authority for ordering disclosure of the IAR in this proceeding. Also, at least as a matter of comity, the Presiding Judge will not interfere with the Court's review of the privileges associated with the IAR. Since Time Warner would not have access to the document before the Court rules (and then only if the ruling is favorable to the Commission) there would be no point for the Presiding Judge to attempt to make such a review before the Court rules. Based on a review of the Constantine Affidavit dated September 20, 1995, which is attached to Liberty's Opposition to the Motion To Compel, the IAR is found to contain information which is directly relevant to this Proceeding. Mr. Constantine reports that:

In late April 1995, Liberty's Chairman, Howard Milstein, became aware that Liberty was providing service to customers in two buildings in New York City utilizing microwave paths that had pending, but not yet granted, applications before the FCC. My law firm and I (the "Firm") were retained to conduct an accelerated outside audit to ascertain whether Liberty had activated service on any other paths where a license application was then pending but had not been granted. In May 1995, the Firm ascertained that service had been initiated to a total of 15 buildings on microwave paths, where license applications were then pending but had not been granted. This conclusion was reported to Mr. Milstein who directed it be disclosed to the Commission.

The Bureau advises that its staff has already seen the contents of the IAR, which was voluntarily disclosed by Liberty See Prehearing Conference, March 26, 1996, Tr. 22-23.

which would assure confidentiality.³ As a logical extension of interim confidentiality, it would be premature to require the disclosure of person(s) at Liberty or representing Liberty who participated in the preparation of the IAR.

4. There will be no evidence discovered of Liberty's contract with the "Europa" because there is no issue involving the "Europa" set in the Hearing Designation Order (FCC 96-85). It appears that the New York State Commission on Cable Television issued an Order To Cease And Desist on November 30, 1995, which preceded the designation of this case for hearing. Therefore, the parties had that information to present to the Commission and an inclusion of a "Europa" issue could have been considered. After release of the Hearing Designation Order, there was no motion filed by any of the parties to add the issue. Therefore, on grounds of relevance there will be no discovery of the "Europa" event.⁴

5. The Bureau takes no position on the discovery relating to the Statement of Eligibility of Use and the Reply pleading for a Special Temporary Authority. Liberty has identified its President, Peter O. Price, as reviewing officer for Liberty. Time Warner seeks no additional information in its Motion To Compel beyond the disclosure of Mr. Price's identity.

6. The Bureau takes no position on the discovery sought by Time Warner relating to "Attachment 1" and "Attachment 2" to Liberty's Consolidated Opposition to a petition that was filed by Time Warner with the Commission seeking a denial of a request for a waiver and a stay of a decision to award Liberty its microwave licenses. A copy of the pleading was filed with Liberty's Opposition to Time Warner's Motion To Compel. The "Attachment 1" document for which discovery is sought is an opinion letter from Liberty's counsel advising that the arrangement that was contemplated with the "Europa" was merely a programming distribution contract with the Europa's owner which did not involve Liberty providing cable service for the residents. The "Attachment 2" document is a copy of the "Private Cable Agreement for Cooperatives and Condominiums"

³ While negotiating the terms of a Protective Order, it would be a highly efficient procedure for the Bureau and Liberty to stipulate into evidence the directly relevant IAR information while omitting portions which may cause embarrassment and which are not directly relevant to the issues. The Presiding Judge would compare the IAR in camera only to assure that the Stipulation was accurate and sufficient. The Court's review would still be concerned about public disclosure (and disclosure to Time Warner) of those parts of the IAR that Liberty deems to be non-negotiable for disclosure. Such a Stipulation could substantially expedite the litigation of this proceeding. Cf. Prehearing Conference, supra at Tr. 17-19.

⁴ There may be an appropriate limited use of Europa evidence if the case reaches the rebuttal stage. But there can be no determination of the relevance or scope of rebuttal evidence until the record of Liberty's case is complete. It also appears from a review of Liberty's Opposition papers that there would be an underlying issue of the relevance of "Europa" to resolve even on rebuttal because Liberty represents that the "Europa" contract merely called for Liberty providing programming to the building's owner.

which is a proposed agreement between Liberty and "Europa."⁵ Since the Europa discovery has been determined to be irrelevant, there will be no requirement that "Attachment 1" or "Attachment 2" be submitted to the Presiding Judge at this time for an in camera review

Document Discovery

7. The above rulings with respect to the IAR and the "Europa" discovery, and with respect to the related "Exhibit 1" and "Exhibit 2" to the Consolidated Opposition, are also applicable to Time Warner's request for documents. Since all fifteen (15) document requests apply to those subjects (i.e., IAR and "Europa" and "Exhibit 1" and "Exhibit 2") it is determined in this ruling that there are no documents to be produced to Time Warner by Liberty at this time.

Order

For the foregoing reasons, Time Warner Cable of New York City's Consolidated Motion To Compel Responses To Interrogatories And Production of Documents By Bartholdi Cable Co., Inc. that was filed by Time Warner Cable of New York City on April 29, 1996, IS DENIED

IT IS FURTHER ORDERED that the procedure for Stipulation suggested by the Presiding Judge in fn. 3 above (and on any acceptable variation) SHALL BE DISCUSSED at the Prehearing Conference set for May 15, 1996.⁶

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁵ Time Warner has not asked an interrogatory about "Attachment 2" but Liberty seeks to obtain a copy of that document.

⁶ Courtesy copies of this Memorandum Opinion and Order were faxed on date of issuance in the a.m. to counsel for each party.